Supreme Court, U.S.
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No. 94-1351

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT STANTON WERNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's right to due process when in the order appointing a land commission, under Fed. R. Civ. P. 71A(h), the court referred to the dollar amount of a since-vacated award made by a previous commission, which amount had previously been disclosed in a published Fourth Circuit opinion.

2. Whether the district court committed reversible error by issuing *ex parte* an order preventing petitioner from deposing or introducing at trial the testimony of a government-designated valuation witness, when at the time petitioner subpoenaed that witness the discovery period had closed, and petitioner and the government had already finished presenting their respective cases in chief.

3. Whether the district court erred in refusing to give certain valuation and evidentiary instructions requested by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is unpublished, but the decision is noted at 36 F.3d 1095 (Table). The order of the district court adopting the report of the land commission (Pet. App. 42a-46a) is reported at 818 F. Supp. 167. The report of the land commission (Pet. App. 47a-59a) is unreported. An earlier opinion of the court of appeals is reported at 916 F.2d 175.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1994. A petition for rehearing was denied on October 13, 1994. The petition for a writ of certiorari was filed on December 28, 1994. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 5, 1980, the United States filed a complaint in condemnation to acquire fee title to 175.76 acres of a 596-acre tract in Jefferson County, West Virginia, owned by petitioner, for use as part of the Appalachian National Scenic Trail. Petitioner's property consists of mountainous land located across the Shenandoah River from Harpers Ferry. Pet. App. 3a-4a.

2. On October 6, 1982, the United States District Court for the Northern District of West Virginia appointed a three-person commission, pursuant to Fed. R. Civ. P. 71A(h), to determine just compensation for the condemned land.[1] After a hearing, the commission filed a report awarding petitioner $263,640, which the district court adopted. Pet. App. 4a. The court of appeals, however, reversed the judgment and remanded for a new hearing, finding that one of the commissioners should have been disqualified for bias. See *United States* v. *Werner*, 916 F.2d 175 (1990).

3. On July 11, 1991, the district court issued an order appointing a new land commission, and

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[1] Under Rule 71A(h), the district court in a condemnation proceeding may, in its discretion, "because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice," appoint a commission of three persons, in lieu of a jury, to determine just compensation. When such a commission is appointed, it is invested with the powers provided a special master under Fed. R. Civ. P. 53. See generally *United States* v. *Merz*, 376 U.S. 192 (1964).

providing to it the same instructions previously given to the first commission. Pet. App. 62a-64a. In the course of explaining the necessity for the commission, the order referred to the Fourth Circuit's reversal of the earlier commission's award on grounds of bias. *Id.* at 62a. Petitioner objected to the order's reference to the dollar amount of the prior award, and requested that the court give a cautionary instruction prohibiting the second commission from relying on the amount of the first award. *Id.* at 65a. The court declined, reasoning that because the amount of the initial award had been published in the Fourth Circuit opinion, it was "a matter of public knowledge." *Ibid.* Moreover, the court stated, there was no harm in the second commission's knowing the amount of the vacated award, because the commission had been instructed adequately as to the grounds on which it must base its own independent determination. *Ibid.*

4. By order of the second commission, each party was limited at trial to four valuation witnesses. In petitioner's case in chief, petitioner and William Malcolm, an expert real estate witness, both testified that the highest and best use of the land before the taking was as a ski resort; that the best use after the taking was for residential development; and that just compensation was between $8,010,000 and $10,785,142. The other witnesses called by petitioner testified that the best use of the land before the taking was for recreational and residential development, and that the best use after the taking was for residential subdivision, yielding just compensation estimates of $1,260,334 and $1,667,268. Pet. App. 6a.

The government presented two valuation witnesses. Each testified that the highest and best use

of the land both before and after the taking was for residential development. One said that just compensation was $211,000. The other contended that just compensation was $158,000. Pet. App. 6a-7a.

5. After four days of testimony, the parties concluded their direct cases, and the commission took a three-week recess before returning for the final two days of rebuttal. During that recess, petitioner subpoenaed William Bowen, a real estate appraiser who had been identified as a potential government witness, but who had not been called to testify. The government moved to quash the subpoena, filed a motion *in limine* to prevent petitioner from introducing Bowen's testimony as to value, and submitted a letter to the court requesting an expedited ruling. The court granted the government's motions *ex parte*, on the grounds that the time for discovery elapsed when the trial began, and that petitioner had already presented the maximum number of valuation witnesses permitted by the commission. Pet. App. 5a, 7a-8a.

6. On October 24, 1991, the commission filed its report, Pet. App. 47a-59a, summarizing the testimony offered by both parties, and setting forth detailed findings of fact. The commission expressly rejected petitioner's contention that the highest and best use of his property was as a ski resort, and found that the highest and best use of the tract was for large lot residential development.[2] The report concluded that

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[2] The government had presented at the hearing substantial evidence that, because of its climate and the absence of a plentiful water supply, petitioner's property could not feasibly be used for a ski resort. Pet. App. 51a-52a, 57a. In rejecting the landowner's position, the commission noted that "of all the fair market value experts who testified for the landowner

the pre-taking market value of the property was $791,300; that the post-taking value of the remaining portion was $395,500; and that just compensation was $395,500. The district court denied petitioner's objections to the report, and adopted the award of the commission. *Id.* at 8a-9a.

7. The court of appeals affirmed. Pet. App. 1a-41a. The court held, first, that the district court did not commit reversible error (and to the extent that there was error, it was harmless) when it informed the second commission of the dollar amount of the award determined by the first commission. *Id.* at 12a-13a. The court rejected petitioner's analogy of a commission to a jury, noting that, under Rule 71A(h), "[a] commission has the authority to regulate the proceedings held before it * * * as well as serving as the finder of fact." Pet. App. 12a. Because the commission was empowered to rule on the admissibility of evidence, and had been instructed to disregard any evidence it found "incompetent, irrelevant, or legally inadmissible," it was to be expected that the commission would hear—and decline to consider—a modicum of improper evidence, such as the amount of the prior commission's award. *Ibid.* Moreover, the court noted, the award made by the second commission was $131,860 greater than the award made by the first commission, and there was no indication in the record that the amount of the second award was in any way influenced by the amount of the first. *Id.* at 13a-14a.

The court of appeals also rejected petitioner's argument that the district court exceeded its juris-

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and the government, not one opined in favor of a winter ski resort." *Id.* at 58a.

diction and violated due process when it granted the government's motions to quash the Bowen subpoena and prevent petitioner from calling Bowen to testify as to value at the hearing. The court expressed doubt that the district court had acted improperly in failing to defer to the commission on matters relating to the subpoena, but held that to the extent that the district court had erred procedurally, the error was harmless. Because petitioner subpoenaed Bowen after the discovery period had closed, and after petitioner had finished presenting his four allotted valuation witnesses, it was simply too late for petitioner to depose Bowen or to introduce Bowen's testimony in petitioner's case in chief. Pet. App. 15a-16a.

In addition, the court of appeals rejected petitioner's challenge to the instructions given by the district court. Noting at the outset that "[t]he district court has considerable discretion in choosing the specific wording of instructions," Pet. App. 17a (quoting *United States* v. *Piche*, 981 F.2d 706, 712 (4th Cir. 1992), cert. denied, 113 S. Ct. 2356 (1993)), the court concluded that the instructions given in this case were satisfactory, see Pet. App. 17a-20a. Moreover, it held, because the instructions given to the second commission were identical to those given to the first, petitioner's failure to object to those instructions at the time of the initial hearing constituted a waiver. *Id.* at 16a-17a.

Finally, the court rejected petitioner's claim that the valuation by the commission was clearly erroneous. Pet. App. 20a-28a. As the court explained, *id.* at 21a-23a, the commission's report adequately set forth the bases for its findings of fact and its just compensation award, thereby satisfying the standards established in *United States* v. *Merz*, 376

U.S. 192 (1964). The commission's report provided "an exhaustive account of the evidence presented at the hearing, * * * summariz[ed] the testimony of every witness, and, quite significantly, indicat[ed] both the testimony upon which the [commission] primarily relied in making its findings as well as its reasons for accepting such testimony." Pet. App. 23a-24a. The report made clear that the commission rejected petitioner's claim that the tract's highest and best use was as a ski resort, *id.* at 25a, and "credit[ed] the testimony of [the government witnesses] * * * because they were the only valuation witnesses who found the highest and best use of the property was a residential development, not a ski resort, and who also credibly used comparable sales as their method of valuation," *id.* at 26a.

Judge Osteen agreed with the majority that petitioner's substantive objections lacked merit, but he dissented as to certain procedural matters. In his view, the district court erred when it informed the second commission of the dollar amount of the first commission's award, and when it granted *ex parte* the government's motion to quash and motion *in limine*. Pet. App. 30a-41a.

ARGUMENT

The decision of the court of appeals in this case was correct, and it does not conflict with any decision of this Court or of any other court of appeals. Petitioner's fact-bound objections raise no issue of general application and do not otherwise merit further review.

1. Petitioner argues (Pet. 8-9) that the district court violated his due process rights when it informed the second commission of the dollar amount

awarded by the first commission and refused subsequently to give a curative, cautionary instruction. That argument is without merit.

A commission is chosen in complex cases requiring greater expertise and knowledge than that possessed by laypersons. See Fed. R. Civ. P. 71A(h); *Alabama Power Co.* v. *1354.02 Acres*, 709 F.2d 666, 667-668 (11th Cir. 1983); *United States* v. *320.0 Acres of Land*, 605 F.2d 762, 828 (5th Cir. 1979). Unlike a jury, a commission has the powers afforded a special master under Fed. R. Civ. P. 53(c). A commission, therefore, is not only the finder of fact, but in addition has the authority to regulate the proceedings before it, including the power to rule on the admissibility of evidence and the duty to refrain from considering evidence found to be inadmissible. In light of the comprehensive adjudicatory role of the commission, the court of appeals correctly found (Pet. App. 12a-13a) that "commissions and juries are dissimilar entities and, although it may be prejudicial to inform a jury of a prior award in a civil action, the same is not true with regard to a commission."

Moreover, even if the district court had erred when it informed the second commission of the prior award, its reference to the prior award was harmless. See Fed. R. Civ. P. 61. The district court instructed the second commission that its chairman was an "experienced attorney," and that "he should make a determination as to the admissibility or inadmissibility of any evidence where such questions arise." Instruction 3, *Procedure* (C.A. App. 71). There is no indication in the record that the commission wrongly deemed the prior award to be admissible evidence of fair value, or that the commission considered the prior award at all in making its own independent

determination. Not once did the commission mention the findings of the first commission, nor did it advert to those findings in its detailed final report. And, significantly, the award of the second commission exceeded that of its predecessor by more than $130,000.[3]

Finally, as the government pointed out in its response to petitioner's request for a cautionary instruction, C.A. App. 95-96, the instruction proffered by petitioner may have increased the probability that the commissioners would be influenced by the prior award, because the proposed instruction placed additional emphasis on the first commission's findings. The instruction proffered was, moreover, drafted in a manner that would have tended to induce the commissioners to reject any award near or below the amount of the previous award. C.A. App. 94, 96.

2. Petitioner renews his contention (Pet. 16-17) that the district court erred in preventing him from deposing William Bowen or calling Bowen as a rebuttal witness. The court of appeals did not rule upon the procedural propriety of the district court's decision, because it concluded that even if the district court erred in making that decision *ex parte*, the error was harmless. As the court explained (Pet. App. 16a), petitioner subpoenaed Bowen after the close of discovery, and after each party had already rested its case in chief. Under those circumstances, the district court correctly ruled that Bowen could

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[3] The order's reference to the prior award was also harmless because, as the district court noted, the dollar amount of the prior award was a matter of public record, having been disclosed in the Fourth Circuit's 1990 opinion. See *United States* v. *Werner*, 916 F.2d 176.

no longer be deposed and could not be called by petitioner to testify as to the value of the property. The court's error in making that determination *ex parte*, if error it was, had no effect on the outcome of the proceedings.

3. None of petitioner's various challenges to the instructions given the commission has merit, and none raises an issue meriting further review.

a. Petitioner argues (Pet. 6-7, 12-14) that the district court erred in refusing his request that it give an instruction on the valuation of unique property by the "bands of value" method, and that the court's refusal to give petitioner's proffered instruction caused the commission wrongly to reject the testimony of his expert, William Malcolm. An instruction based on the so-called "bands of value" theory, however, would have violated the principle—commonly referred to as the "unit rule"—that property is to be valued as a whole, with its constituent parts considered only for the purpose of determining how they enhance (or diminish) that value of the whole, with care being exercised to avoid so-called "cumulative" appraisals. See *United States* v. *91.90 Acres of Land* (*Walsh Refractories*), 586 F.2d 79, 87 (8th Cir. 1978), cert. denied, 441 U.S. 944 (1979); *Cade* v. *United States*, 213 F.2d 138, 142 (4th Cir. 1954); *United States* v. *Meyer*, 113 F.2d 387, 397 (7th Cir.), cert. denied, 311 U.S. 706 (1940); *Morton Butler Timber Co.* v. *United States*, 91 F.2d 884, 890-891 (6th Cir. 1937).[4]

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[4] Accordingly, the district court in this case was correct in instructing the commission as follows:

> You are to consider the value of the land as a whole, as a unit. While in making your award you should consider all

Petitioner's expert witness, Malcolm, arrived at his value assessment by adding together the supposed values of individual components of a resort based on the values of those components at existing resorts. Gov't C.A. Br. 10. Although the commission did not explain in detail why it found Malcolm's appraisal methodology inconsistent with the district court's instructions, Pet. App. 50a, the commission correctly declined to rely on Malcolm's valuation. First, instead of assessing the value of an entire ski resort with the specified components, as he should have done, Malcolm simply assumed that individual components, such as condominiums, could be placed throughout the property, and that the values of the individual components could be added to determine the value of the tract as a whole. Gov't C.A. Br. 10. Second, Malcolm conceded on cross-examination certain obvious and critical weaknesses in his appraisal methodology: He had not used a comparable sales approach to value petitioner's property as a ski resort; he recognized that there are no ski areas further south than petitioner's site with as low a vertical drop; and his appraisal figures were based on information derived from land sold at existing ski facilities, even though petitioner's land was as yet undeveloped. *Id.* at 11.

> elements of value, such as farming value, if any, timber value, if any, or mineral value, if any, you cannot separately value each of these elements and aggregate them to reach the value of the entire tract. This is true because *these factors of value do not exist independently of each other and cannot be realized at the same time.*

Instruction 4, *Just Compensation* (C.A. App. 78) (emphasis added).

At any rate, even if Malcolm's valuation method had been accepted by the commission, the commission would nonetheless have rejected Malcolm's estimate of fair value, because the commission rejected his premise that the tract's highest and best use was as a ski resort. Pet. App. 58a.

b. Contrary to petitioner's contention (Pet. 14), there was no need for a specific instruction respecting petitioner's competency to testify as to the value of the property. The district court instructed the commission generally that a witness should be permitted to "testify as to an opinion of value he has by reason of investigation, training, experience, or other qualifications," Instruction 2, *Weighing the Evidence* (C.A. App. 73), and petitioner was in fact permitted to testify both on direct and in rebuttal as to his opinion of the best and highest use, and value, of the property, Pet. App. 48a, 56a. The court instructed the commission, however, that the weight to be given opinion testimony would vary depending on "the manner and demeanor of the witness, the bias or lack of bias, the grounds upon which the witness based his opinion, his experience and knowledge of the matters about which he is testifying * * *, and the reasonableness or unreasonableness of his opinion." Instruction 2, *supra*. After hearing petitioner's testimony, the commission rejected his position that the best and highest use of the property was as a ski resort. Pet. App. 58a. While petitioner disagrees with the commission's factual determination, he has not identified any defect in the district court's instructions.

c. Finally, notwithstanding petitioner's contrary assertion (Pet. 14), no separate instruction on severance damages was called for in this case. The

district court gave the following instruction regarding valuation of a partial taking:

> You may have instances in which the Government has taken a part only of a larger tract, leaving the remainder to the landowner. In such a situation, the taking may not affect the value of the remainder in any way [or] it may either damage or benefit the remainder, depending upon the circumstances of the case. In any such situation the measure of just compensation is the same, that is, the difference between the fair and reasonable market value of the entire tract of land immediately before the taking and the fair and reasonable market value of the portion that remains after the taking.

Instruction 7, *Just Compensation* (C.A. App. 79). As the court of appeals recognized, Pet. App. 20a, the "before and after" method of valuation described by the district court adequately takes severance damages into account. See *United States* v. *2.33 Acres of Land*, 704 F.2d 728, 730 (4th Cir. 1983); *United States* v. *91.90 Acres of Land*, 586 F.2d at 86.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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